No. 5751

United States Circuit Court of Appeals

For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

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CASED CITED.

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Brief of Appellee

This case is virtually the converse of its companion case, No. 5752. In that case appellant ignored the commissioner and made his objection in the District Court, before which nothing was pending. In this case appellant ignored the District Court's jurisdiction, and caused the search warrant to be quashed by the commissioner, beyond whose jurisdiction the matter had already gone. Clearly appellant was wrong in both instances.

THE FACTS.

Appellant's statement of facts in his brief filed herein is substantially correct except as to one matter. On page 5 he says, with reference to the commissioner's hearing upon the motion to quash:

> "Twelve witnesses gave testimony at the hearing before the commissioner in direct contradiction to the uncorroborated affidavit of "B. M. Sharp" (R. p. 49).

The sentence referred to in the commissioner's findings (R. p. 49), apparently bears out appellant's summary, but the balance of the commissioner's findings (R. pp. 46, 47, 48), shows that the said conclusion was entirely unwarranted and inaccurate. The only direct contradiction to the affidavit of sale was appellant's denial and the testimony of members of his household. This is clearly shown by the commissioner's findings (R. pp. 47, 48):

> "The testimony of Elizabeth Herter, Mary Herter, Anne Sailer, and Mrs. Mary E. Herter, was introduced to the effect that all of these witnesses were present on the premises during all or some portion of the particular day in question, either one, two or more of the said witnesses being on the premises at all times during the day, and that during the periods that the defendant was at home that neither B. M. Sharp, who is unknown to them, or any other man visited the said premises, and that there was no sale of any kind to the said B. M. Sharp or to any other persons. These witnesses testified further that the said B. M. Sharp, did not visit the said premises during the said day, and that there was no other strange person who visited the premises during the said day, nor was there any sale of intoxicating liquor upon the said premises during the said day.

> The testimony of these witnesses corroborates the testimony of the defendant himself with regard to the sale of intoxicating liquor, or the visit of B. M. Sharp or any other person at the premises during such time as the defendant himself was at home during that particular day."

The other seven witnesses merely testified to appellant's presence elsewhere during portions of the day, and their statements cannot possibly be construed as "in direct contradiction" to the affidavit of sale. The commissioner's determination of the fact question was clearly wrong.

This would be significant in judging the credit and weight to be given the commissioner's action if that action were entitled to any consideration whatever.

COMMISSIONER'S ACTION IN EXCESS OF JURISDICTION AND VOID.

As a matter of fact, however, it is very clear that the commissioner's action was outside of his jurisdiction and therefore entirely void.

It is apparent that the commissioner's power to quash a search warrant exists only while the matter is before him in the preliminary stages. Its purpose is to prevent the use of objectionable evidence in the preliminary proceedings before the commissioner, and after the matter has proceeded beyond that stage he has no further jurisdiction.

The case of U. S. v. McKay, 2 F. (2d) 257, is directly in point. There the defendant was not taken before the commissioner at all, but was arraigned in Dis-

trict Court upon an information filed directly therein. The court held that the commissioner was right in refusing to act upon the ground that he had no jurisdiction. The court said (p. 258):

> "It is wholly inconsistent with recognized rules of legal procedure that a commissioner, after a case has been removed from his jurisdiction, can determine what evidence may and what may not be presented in court. The information charging defendants with a violation of the National Prohibition Act has been filed in court. * * * Can it be contended that the commissioner, after the information had thus been filed, had the power to suppress the proof on which it was based, and on which the court acted? If the commissioner has such power, when does the right to exercise it cease? Can he thus act during or after the trial on the information in the District Court? These questions answer themselves."

The decision in this case should definitely settle once for all, the contention that the commissioner, a committing magistrate for preliminary matters, has continuing authority after those preliminary matters have been disposed of. It should settle once for all, the contention that such a magistrate, the appointee of the Court, has continuing power after a matter has reached that Court, to determine what evidence may be adduced therein.

No authority whatever can be found for such contentions, nor can any persuasive argument be presented therefor.

JUDGE PRAY'S ORDER INEFFECTIVE.

Appellant apparently relies upon the order of Judge Pray, one of the District Judges, purporting to remit the search warrant papers to the commissioner (R. p. 40).

It will be noticed that the order in question does not expressly purport to revest the commissioner with jurisdiction, but merely orders:

> "That the petitioner Karl Herter be and he is hereby given leave to take such other and further *proceedings before such Commissioner as may be lawful* to controvert the grounds on which the said warrant was issued." (Italics ours.)

Apparently no attempt was made to determine or to order what "proceedings before such commissioner" "may be lawful" at that stage of the case.

But if the intention was to revest jurisdiction in the commissioner, the order was entirely void. The commissioner's authority is entirely statutory and limited to preliminary matters. U. S. v. McKay, 2 F. (2d) 257; U. S. v. Ephraim, 8 F. (2d.) 512; U. S. v. Napela, 28 F. (2d) 898. There is no known authority under which the District Court can enlarge that jurisdiction. Nor is there any authority under which the District Court can divest itself of any part of its jurisdiction in such matters, or under which it can delegate to any officer the question of admissibility of evidence in matters before it. The commissioner's action was entirely *ultra vires* and void, despite the order of Judge Pray.

EXCLUSION OF OFFERED EVIDENCE NO ERROR.

The exclusion of Judge Pray's order and of the commissioner's findings and conclusions was therefore not erroneous, as those documents were of no effect.

And if erroneous the error was not prejudicial, for commissioner's proceedings in such matters are before the Court without being put in evidence (U. S. v. Casino, 286 Fed. 976) and the matter was for the court only and not for the jury.

In this connection it will be noticed that appellant also included in transcript (R. p. 25) his application and affidavit for Judge Pray's order, although they were not offered in evidence at all.

MOTION TO SUPPRESS NOT PROPERLY PRESENTED.

It is clear that the appellant's motion was not properly made before the District Court, for it was based, not on the alleged invalidity of the search, but on the fact that the commissioner had quashed the warrant. Appellant recognized that fact when he failed to present to the Court evidence of the supposed invalidity of the warrant, or even to offer in evidence the transcript of testimony taken before the commissioner. It may be that if appellant had properly moved the District Court to suppress the evidence he would have been entitled to present to it any proper testimony to show the

invalidity of the warrant and of the search. The decision in U. S. v. Napela, 28 F. (2d) 898, suggests that independent of Title 18 U. S. C. A. Secs. 625, 626, the defendant has such right. In any event, the matter having gone beyond the commissioner, appellant's remedy properly was to make his showing before the District Court. This he failed to do.

Even if the commissioner's action had validity, it was not final, conclusive or binding on the District Court. U. S. v. Madden, 297 F. 679; U. S. v. Casino, 286 F. 976; U. S. v. Deloic, 2 F. (2d) 377; U. S. v. Maresca, 266 F. 713; U. S. v. Jensen, 291 F. 668.

There can be no doubt that the admissibility of evidence is for the trial court and that it cannot be concluded by the commissioner's ruling. Therefore, if defendant objected to the admissibility of evidence he should have made proper objection and showing before the District Court. This he did not do.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

The possession of beer, wine and whiskey in appellant's house was prima facie unlawful.

Section 33 of the National Prohibition Act, Title 27, U. S. C. A., Section 50, reads as follows:

> "The possession of liquors by any person not legally permitted under this chapter to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this chap-

ter. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; *and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.* (Oct. 28, 1919, c. 85, Title II, Sec. 33, 41 Stat. 317.)" (Italics ours).

It will be noticed that this section includes three propositions: First, that possession of liquor is prima facie unlawful; Second, that possession in one's dwelling is not unlawful under certain *fact* situations; Third; that the burden shall be upon the possessor in *all* instances "to prove that such liquor was lawfully acquired, possessed, and used."

Singleton vs. U. S. (C. C. A., S. C. 1923) 290 F. 130.

Mason vs. U. S. (C. C. A. Ill. 1924) 1 F. (2d) 279, Certiorari denied (1924) 45 S. Ct. 97, 266 U. S. 611, 69 L. Ed. 467.

Filippelli vs. U. S. (C. C. A., 9th Circuit), 6 F. (2d) 121, 125.

Barker vs. U. S., (C. C. A. 4th Circuit) 289 F. 249.

Under the statute quoted above there is no presumption that possession of intoxicating liquor in a home is lawful; on the contrary the presumption is that the possession is unlawful, unless the special permitted purpose is shown as a matter of fact; and this

presumption is so strong that the burden is upon the possessor to prove the lawfulness, not only of the possession and use, but also of the acquisition.

In the present case appellant presented no evidence of any kind to show the lawfulness of his acquisition, possession or use of the liquor in question. His affidavit attached as Exhibit "B" (R. p. 31) to his petition for remission of papers to commissioner (R. p. 25) states certain conclusions as to the purpose for and use of the liquor, but neither the said application nor the affidavit was offered in evidence, and the same are not properly in the record or before this Court on appeal. And the said papers make no reference at all to the manner of acquisition of the liquor.

Against this failure of appellant to show the lawfulness of his possession, use or acquisition of the intoxicating liquor is the affidavit for search warrant showing the sale of liquor at the premises, the return on the search warrant in evidence (R. p. 60), showing (R. p. 21), the seizure of *home brew* beer; the testimony of Agent Reed (R. pp. 60, 61) showing the finding of 264 quarts of *home brew beer*, five gallons of wine and two gallons of whiskey; the testimony of Agent Jones (R. p. 63) showing the finding of 261 quarts of *home* beer, two gallons of *moonshine* whiskey, and five gallons of wine; the testimony of Agent Adams (R. p. 64) showing the finding of that amount of *home brew* beer, whiskey and wine; and the testimony of Agent Dibble as to the amount found.

We thus have an affirmative showing of *moonshine* whiskey and *home brew* beer, which could not have been lawfully acquired, used or possessed; furthermore, the amount found would negative possession for mere family use.

Not only was the possession clearly unlawful, but appellant made no effort to show the lawfulness thereof.

NO PREJUDICIAL ERROR IN THE COMMENTS OR INSTRUCTIONS OF THE COURT.

There was therefore no prejudicial error in the comments or instructions of the court under the facts of the case. The evidence showed a possession of liquor that could not have been lawfully made, acquired, used or possessed, and in amounts negativing any lawful use. Under those facts the comments and instructions were correct, or if not correct any error was non-prejudicial.

NO ERROR IN DENYING OFFERED INSTRUCTIONS 1, 2 OR 6.

Appellant's offered instructions 1, 2 and 6, and each of them, were clearly inaccurate and as clearly not applicable to the facts shown.

Furthermore, the record shows no exception to the Court's refusal to give the said instructions, or any of them. Appellant is therefore in no position to complain.

For these reasons the judgment should be affirmed.

Respectfully submitted,

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